

DOG-FOCUSED LAW'S IMPACT ON DISABILITY
RIGHTS: ONTARIO'S PIT BULL LEGISLATION
AS A CASE IN POINT

By
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Legislation that affects dogs also affects persons with disabilities to some extent. This link shows up in statutory definitions, is justified by social construction theory, and has been reified in case law. Thus, it is important to examine statutes like Ontario's pit bull legislation in terms of their potential impact on persons with disabilities. Upon close examination, it appears that the legislation suffers from vague definitions, conflicting onus of proof, absence of fair process, and severe penalties, including imprisonment. Further, it contains no reference to dogs used by persons with disabilities. This means that there is potential for persons with disabilities to suffer negative consequences and a need to consider disability rights in dog-focused legislation.

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I. INTRODUCTION

Dogs are linked to legal constructs of disability. This shows up in a series of cases where courts have been asked to grapple with legal issues regarding guide/assistive dogs or animals and definitions of disability.¹ There is a discernible trend toward expanding the legal meaning of guide/assistive dog to include more animals and more types of relationships between humans and animals.² Via this process, the definition of disability and the meaning of the term guide/assistive dog are becoming a single legal entity on some fronts.

In this vein, dog-focused legislation that imposes penalties for dog ownership and increases negative public perception of dogs affects persons with disabilities who rely on guide/assistive dogs. Canadian legal definitions of disability and the role of dogs in the social construction of disability support this thesis. Thus, in this context, regulating dogs is to some extent regulating disability.

It is therefore important to scrutinize dog-focused legislation in terms of its ripple effects into disability rights. To this end, this article examines the Ontario pit bull legislation (OPBL) that came into effect in 2005.³ Noticeably absent from the debate that led up to the enactment of this legislation was consideration of disability issues.⁴ The goal of this article is to provide justification for adding disability issues to debates about this and other dog-focused legislation.

The argument rests upon several pillars that are presented in detail below. Persons with disabilities may be stigmatized because of the visible cultural symbol of a guide/assistive dog, to the point that they may forgo use of a guide/assistive dog when this could be helpful in increasing their ability to function. If public perceptions of dogs generally become more negative as a result of dog-focused legislation, then the negative value of the stigma will increase. Worries about the possibility of penalties for harboring a dog add a negative dimension.

Negative attitudes toward guide/assistive dogs are already evident in case law.⁵ The legal definition of guide/assistive dog is expanding to include more types of animals and relationships, like support, rather than just instrumental roles.⁶ So a person with a disability who owns a companion animal, including any dog, may suffer penalties—even jail time.⁷ This means that an animal need not be a

¹ *Infra* pt. III. This article uses the term “guide/assistive” animals to refer to the broad, expanding category of assistive animals recognized in case law.

² See *infra* n. 56 (citing cases to this effect).

³ *The Dog Owners’ Liability Act*, R.S.O., ch. D.16 (1990) (Can.) (amended by ch. 26, 2000 Sched. A, s. 6; 2005, c. 2, s. 1).

⁴ Legis. Assembly of Ontario, *Off. Rpt. of Debates*, 1st Sess., 38th Parliament (Feb. 10, 2005).

⁵ *Infra* nn. 92–97 and accompanying text.

⁶ *Infra* n. 58 and accompanying text.

⁷ R.S.O., ch. D.16 at § 18(1).

traditional guide dog in a harness to evoke negative reactions that could be detrimental to persons with disabilities.

Since the OPBL only came into full effect in fall 2005,⁸ at present there is no empirical evidence available to support this argument. It will only be confirmed after an empirical study or when there is a case where disability rights come into conflict with a push to have a dog destroyed and/or owner penalized where a dog has allegedly menaced. The importance of the argument is that it suggests something about the issue of disability. Even if disagreed with, or ultimately proven wrong empirically, it shows that disability issues have been given consideration. The legislation should have included exemptions for guide/assistive dogs. Even with such exemptions, it would still have potentially negative indirect effects on disability issues.

The article begins in part II by setting out the rationale for why it is worthwhile to see dog-focused legislation in terms of its impact on disability rights, including statutory definitions and theory on the social construction of disability. This leads to a review of common law relevant to questions of disability and dogs in part III. With the rationale for a dog/disability connection and a review of common law on the subject in place, the article moves on to consider the specifics of the OPBL in part IV. This part sets out several aspects of the legislation that suggest there will be a negative impact on dogs and their owners. Part V concludes with observations about the relevance of seeing a dog/disability link.

II. THE LINK BETWEEN DOGS AND DISABILITY

The OPBL emerged from a highly charged political climate in Ontario that focused on stricter regulation of dog ownership, including criminalization. For several months, there were impassioned pleas in the media and to the provincial government from people who had been attacked by dogs, were close to someone who had been attacked, or knew of an animal being attacked by a dog.⁹ Various experts on animals and animal welfare organizations lined up against the legislation and, in particular, the utility of focusing on a specific breed.¹⁰ It became clear that the government was going to cede to the appeals of parties wanting greater regulation.¹¹ However, it was not clear whether the government considered what this legislation would mean to persons with disabilities given the relation of guide/assistive dogs to some forms of disabilities.

The OPBL has legal implications for persons with disabilities. Review of secondary analysis, case law, and statutes suggests that there

⁸ R.S.O., ch. D.16.

⁹ Bob MacDonald, *Ontarians Bite Back; Pass Pit Bull Ban Fast, Says Bob MacDonald*, Toronto Sun 7 (Oct. 2, 2004).

¹⁰ Sandy Naiman, *Ban on the Run; Controversial Pit Bull Hearings Have Dog Owners Howling in Protest, Sandy Naiman Reports*, Toronto Sun 40 (Jan. 23, 2005).

¹¹ *Id.*

are grounds for a connection between dogs and disability on two fronts: statutory definitions and the social construction of disability. Statutory definitions point out that dogs are directly legislated into the formal terms that impact various forms of disability rights. Social construction enters into both the lived experience of disability and recent recognition by the courts that such social constructions are a relevant part of disability. Part II considers each of these areas.

A. *Statutory Definitions of Disability*

The inclusion of guide/assistive dogs in definitions of disability in Canadian provincial legislation reflects guide/assistive dogs as a fundamental part of disability issues. Human rights legislation for Newfoundland, Alberta, Manitoba, Nova Scotia, New Brunswick, and Prince Edward Island include reliance on a guide/assistive dog in the definition of disability.¹² More specific definitions of animal reliance are also found in Saskatchewan (service animal) and Manitoba (guide dog) legislation.¹³ The *Ontarians with Disabilities Act* includes “physical reliance on a guide dog or other animal.”¹⁴ This exact phrase is also part of the Ontario *Human Rights Code* definition of disability,¹⁵ giving use of, or reliance on, guide/assistive dogs or other animals a particular legal meaning in key human rights legislation.

The inclusion of guide/assistive dogs in statutory disability definitions also shows up in Canadian income tax legislation that provides for medical expenses tax credits associated with getting and maintaining an animal that has assistance training.¹⁶ The tax credit is specifically for the cost of an animals assisting with blindness, deafness, or restricted use of arms and legs.¹⁷ There has been a tendency to give liberal interpretation to medical expenses.¹⁸ However, the wording of the income tax legislation has several effects on persons with disabilities, such as imposing a medical definition on disability and restricting expenses to a narrow group of persons with disabilities.¹⁹ On a positive note, it also allows for the broader term “animals,” guide/assistive dogs being just one example.²⁰

Evidence from U.S. law shows that guide/assistive dog use is becoming an increasingly important aspect of the legal definition of disa-

¹² *Human Rights Code*, R.S.N.L., ch. H-14, § 2(1) (1990) (Can.); *Human Rights, Citizenship and Multiculturalism Act*, R.S.A., ch. H-14, § 44(1)(1) (2000) (Can.); *Human Rights Code*, S.M., ch. HI 75, § 9(2) (1987) (Can.); *Human Rights Act*, R.S.N.S., ch. 214, § 9(1) (1989) (Can.); *Human Rights Act* S.N.B., ch.30, § 2 (1985) (Can.); *Human Rights Act*, S.P.E.I., ch. H-12, § 1(1)(1) (1988) (Can.).

¹³ *Human Rights Code*, S.S., ch. S-24.1, § 2(1)(d.1) (1979) (Can.); *Human Rights Code*, S.M., ch. HI 75, § 1 (1987) (Can.).

¹⁴ *Ontarians with Disabilities Act*, S.O., ch. 32, § 2.1(a) (2001) (Can.).

¹⁵ *Human Rights Code*, R.S.O., ch. H.19, § 10.1(a) (1990) (Can.).

¹⁶ David G. Duff, *Disability and the Income Tax*, 45 McGill L.J. 797, 810 (2000).

¹⁷ *Id.*

¹⁸ *Id.* at 812.

¹⁹ *Id.* at 842.

²⁰ *Id.* at 810.

bility and that the term “guide dog” is becoming more inclusive.²¹ Indeed, state quarantine laws have come under attack for being discriminatory when they prohibit interstate travel by persons with disabilities and their guide/assistive dogs.²² Likewise, California’s requirement that guide/assistive dogs have official tags before a dog will be allowed access to public buildings may expose to liability those business owners and other parties who rely on this requirement to deny access to disabled persons and their guide/assistive dogs.²³ A paradox exists in the definition of disability in U.S. law involving guide/assistive dogs. If a person is no longer substantially limited in a life activity because of a guide/assistive dog’s services, the person may no longer fit the statutory definition of disability and may lose the right to be accompanied by the dog.²⁴ This issue also arises in Canadian case law, as will be discussed in detail below in part III.

Dog use can be seen as a relevant feature of the definition of disability within the meaning of relevant Canadian and American laws. Therefore, dog use is an important aspect of analysis of the definition of disability. It adds to consideration of how legislation that impacts dog ownership and use impacts the rights of persons with disabilities.

B. Social Construction of Disability

Guide/assistive dogs are common cultural symbols that identify or label someone as a person with a disability.²⁵ Dogs are therefore a key part of the social construction of disability.²⁶ When a person with a disability interacts in various forms of social life such as work, family, neighborhood, or school, the presence of a guide/assistive dog forms a particular social identity for the person with the dog.²⁷ This means that attitudes toward dogs affect attitudes toward persons with disabilities. That is, if legislation fuels the idea that dogs and their behav-

²¹ Susan D. Semmel, Student Author, *When Pigs Fly, They Go First Class: Service Animals in the Twenty-First Century*, 3 *Barry L. Rev.* 39, 43–44 (2002).

²² Sande Buhai Pond, *No Dogs Allowed: Hawaii’s Quarantine Law Violates the Rights of People with Disabilities*, 29 *Loy. L.A. L. Rev.* 145, 149–51 (1995).

²³ Joshua M. Dickey, *Disabled Access and Dog Tags: “Cleaning Up” Equal Access for Disabled Individuals*, 28 *P. L.J.* 883, 889–91 (1997).

²⁴ Dawn Capp & Joan G. Esnayra, *It’s All in Your Head—Defining Psychiatric Disabilities as Physical Disabilities*, 23 *Thomas Jefferson L. Rev.* 97, 104–05 (2000).

²⁵ Sandra D. Dawson, *Protecting a Special Class of Animal: An Examination of and Recommendations for Enacting Dog Guide Protection Statutes*, 37 *Conn. L. Rev.* 569, 599 (2004).

²⁶ See Janet Radcliffe Richards, *How Not to End Disability*, 39 *San Diego L. Rev.* 693 (2002) (describing disability as a function of an impaired person’s interaction with the environment).

²⁷ See e.g. Elizabeth Dickson, *Understanding Disability: An Analysis of the Influence of the Social Model of Disability in the Drafting of the Anti-Discrimination Act 1991 (Qld) and in Its Interpretation and Application*, 8 *Australia & New Zealand J.L. & Educ.* 45, 46 (2003) (noting reliance on a guide dog in the definition of “impairment” and disability defined as “the social restriction experienced by a person with an impairment”).

ior are dangerous, negative ripple effects pertaining to the social constructions of disability may result.

The potential effect of negative social constructions, or labeling, has gained attention in sociology in the areas of mental illness and disabilities.²⁸ These theories and empirical observations demonstrate that negative social constructions can magnify problems of marginalization and lower self esteem, thereby setting people into life career patterns that limit the realization of their potential in various spheres of social life.²⁹ Disability social construction is also linked with conceptions of stigma that point out the importance of human interaction with non-human animals in the development and maintenance of human social identity.³⁰ The negative effects of stigma are demonstrated specifically in terms of disabilities in a study showing that where a disability is stigmatized, mothers of children with the disability have more stress, and the children are less likely to engage in informal interaction.³¹

Social science research findings suggest that persons with disabilities are discredited socially, and experience heightened discrimination by virtue of the presence of mobility aids such as canes and guide/assistive dogs.³² Because of this, blind persons tend to have ambiguous attitudes toward such mobility aids.³³ Guide/assistive dogs culturally signify disability.³⁴ Disability is often socially constructed as negative.³⁵ Negative views of dogs may increase this negative association and thus have a detrimental effect on persons with disabilities.

If an additional stigma is created by a heightened fear of dogs, it is likely that social discrediting of persons with disabilities will increase. People may even forego or abandon guide/assistive dogs that would im-

²⁸ Edwin Lemert, *Social Pathology* 51 (McGraw-Hill Book Co. Inc. 1951); Bruce G. Link et al., *A Modified Labelling Theory Approach to Mental Disorders: An Empirical Assessment*, 54 *Am. Sociological Rev.* 400, 400 (1989); Thomas J. Scheff, *The Role of the Mentally Ill and the Dynamics of Mental Disorder: A Research Framework*, 26 *Sociometry* 436, 437–38 (1963); Carl A. Maida, *Campaign Against Stigma: Patients and the Ongoing Therapeutic Revolution*, <http://baywood.metapress.com/link.asp?id=2kjldqr9y66q2v29> (accessed Apr. 25, 2006).

²⁹ Lemert, *supra* n. 28, at 51; Link et al., *supra* n. 28, at 400; Scheff, *supra* n. 28, at 437–38; Maida, *supra* n. 28, at <http://baywood.metapress.com/link.asp?id=2kjldqr9y66q2v29>.

³⁰ Clinton R. Sanders, *Actions Speak Louder than Words: Close Relationships between Humans and Nonhuman Animals*, 26 *Symbolic Interaction*, 405, 405–26 (Summer 2003) (available at <http://caliber.ucpress.net/doi/abs/10.1525/si.2003.26.3.405;jsessionid=iuolTyne2Uc70CohoN?journalCode=si>).

³¹ Sara E. Green, *What Do You Mean "What's Wrong with Her?": Stigma and the Lives of Families of Children with Disabilities*, 57 *Soc. Sci. & Med.* 1361, 1361–74 (2003); see generally Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Prentice-Hall, Inc. 1963) (analyzing socialization strategies of persons with disabilities).

³² Shlomo Dshen & Hilda Dshen, *On Social Aspects of the Usage of Guide-Dogs and Long-Canes*, 37 *Sociological Rev.* 89, 89–90 (1989).

³³ *Id.*

³⁴ *Id.* at 96.

³⁵ *Id.* at 89.

prove their levels of physical and social participation in order to avoid the social stigma or legal liability. This may undermine the free and comfortable use of guide/assistive dogs by persons with disabilities and thus increase levels of marginalization.

Statutory definitions of disability and social constructions are two complementary rationales for the link between dogs and disability in law. Social constructions of disability, as indicated by guide/assistive dogs, may enter into the lived experiences of persons with disabilities in a negative way when laws regulate dogs. As will be discussed in detail in the next section, courts have come to recognize the importance of social constructions as an aspect of discrimination.

III. COMMON LAW INTEGRATING DOGS AND DISABILITY

Courts have been grappling with concepts of disability, dogs, and their relationship.³⁶ This forms an interesting history in the development of law on disability. The history is relatively short, in that the cases begin in the 1980s.³⁷ It is also diverse, in that issues encompass work, divorce settlements, housing, immigration, social access, and health care.³⁸ In total, it reflects an expanding interpretation of the relationship between animals and persons with disabilities. Courts have shown greater willingness to affirm the rights of persons with disabilities who rely on animals as they have defined disability and guide/assistive dogs.

A. *Disability*

Definitions of disability have been contentious in case law. Various cases have shown that courts are taking the definition of disability seriously and that the definition has been tested on a variety of aspects.³⁹ Courts have taken a broad and liberal interpretation of disability that is amenable to the inclusion of guide/assistive dogs and other animals, and have acknowledged an expanding set of relationships between persons with disabilities and animals.⁴⁰

The Supreme Court of Canada has made a significant statement on the nature of disability. In a 2000 case interpreting the equality provisions of the *Canadian Charter of Rights and Freedom (Charter)*, Justice Binnie offered:

It is therefore useful to keep distinct the component of disability that may be said to be located in an individual, namely the aspects of physical or mental impairment, and functional limitation, and on the other hand the other component, namely, the socially constructed handicap that is not lo-

³⁶ See *Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996) (Hawaii's quarantine requirement for guide dogs violated the Americans with Disabilities Act.).

³⁷ *Majors v. Hous. Auth. of DeKalb County Ga.*, 652 F.2d 454, 454 (5th Cir. 1981).

³⁸ *Id.* at 455.

³⁹ *Bragdon v. Abbott*, 524 U.S. 624, 624 (1998).

⁴⁰ *Id.* at 631 (expanding "disability" to include HIV carriers).

cated in the individual at all but in the society in which the individual is obliged to go about his or her everyday tasks.⁴¹

This establishes that social construction is one aspect of disability. It also makes a direct link to the social theories of stigma and labeling discussed above. The Supreme Court of Canada has effectively imported the sociological notion of social construction into its legal definitions of disability.

This same principle is reiterated by the Supreme Court of Canada in another 2000 case, *City of Montreal*, with Justice L'Heureux-Dubé writing:

Thus, a “handicap” may be the result of a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all of these factors. Indeed, it is the combined effect of all these circumstances that determines whether the individual has a “handicap” for the purposes of the Charter.

Courts will, therefore, have to consider not only an individual's biomedical condition, but also the circumstances in which a distinction is made. In examining the context in which the impugned act occurred, courts must determine, *inter alia*, whether an actual or perceived ailment causes the individual to experience “the loss or limitation of opportunities to take part in the life of the community on an equal level with others.” . . . The fact remains that a “handicap” also includes persons who have overcome all functional limitations and who are limited in their everyday activities only by the prejudice or stereotypes that are associated with this ground . . .⁴²

This suggests that the Supreme Court of Canada has affirmed the idea that social constructions of disability may be as—or more—important than physical or mental conditions. However, the picture at the lower courts is not as clear.

A 2003 Newfoundland court of appeal case, *Evans v. Health Care Corp. of St. John's*, demonstrates how definitions of disability have been contentious in legal proceedings and how human rights codes definitions have been used to draw distinctions.⁴³ Ms. Evans did not define herself as having a disability; neither did her employer.⁴⁴ However, Ms. Evans' prior excessive use of sick leave over a twenty-year period was used to determine whether she or another employee received a promotion.⁴⁵ The other employee received the promotion, while Ms. Evans complained that she was denied the promotion based

⁴¹ *Granovsky v. Canada (Minister of Empl. and Immig.)*, [2000] 1 S.C.R. 703, 724 (interpreting the *Charter of Rights and Freedom*, Part I of the *Constitution Act* (1982) being Schedule B to the *Canada Act* (1982)).

⁴² *City of Montreal & Communauté Urbaine de Montréal v. Commission des Droits de la Personne et des Droits de la Jeunesse*, [2000] 1 S.C.R. 665, 185 D.L.R. (4th) 385, ¶ 79–80.

⁴³ *Evans v. Health Care Corp. of St. John's*, N.J. No. 61, ¶ 13 (NLCA 13 2003) (available at 2003 NL. C. LEXIS 196).

⁴⁴ *Id.* at ¶ 14.

⁴⁵ *Id.* at ¶ 3.

on disability.⁴⁶ Her complaint was dismissed by an adjudicator appointed pursuant to the provincial human rights code.⁴⁷ Her subsequent appeal was denied by both the trial court and the Court of Appeal with costs awarded to the employer.⁴⁸

What is interesting about the case, for the focus of this article, is how contentious definitions of disability are in practice. This recent case reviews, summarizes, and reifies various judgments on the definition of disability. In so doing, it establishes several things. Issues of disability have a “special status” and should be given “liberal” interpretation.⁴⁹ Further, there is a recognition of the importance of the social construction of disability.⁵⁰ However, courts appear to be setting boundaries in terms of what qualifies as disability.

Definitions of disability are contentious and under revision, as illustrated again in the 1993 case, *St. Paul*.⁵¹ Here a woman filed a complaint under the *Saskatchewan Human Rights Code*, alleging that an employer’s failure to hire her because of her obesity constituted discrimination based on disability.⁵² The court offered comment that it thought the behavior of the employer was wrong.⁵³ However, it held that this did not constitute discrimination under the meaning of the Act, since it had not been proved that the obesity resulted from bodily injury, birth defect, or illness.⁵⁴ The court observed that the cause of obesity was difficult to know in any given person.⁵⁵

This raises an interesting and perhaps disquieting note. It focuses disability back on physical issues and away from the experience of disability as a social construction. In so doing, it would seem to be a step backward from the view of disability as encompassing social construction that was outlined in *Evans*, *City of Montreal*, and *Granovsky*.⁵⁶ While *St. Paul* came before these decisions, it deals with a form of disability that may be on the boundaries of courts’ legal definition of disability.⁵⁷ Therefore, it may be relevant if the specific example of obesity is revisited by the courts, or if the issue of the relationship of dogs to disability becomes contentious. Broad and liberal Supreme Court definitions may become narrowed or be given stricter definitions as more

⁴⁶ *Id.* at ¶ 4.

⁴⁷ *Id.* at ¶ 14.

⁴⁸ *Id.* at ¶¶ 5–6.

⁴⁹ *Evans*, 2003 N.J. No. 61 at ¶ 23.

⁵⁰ *Id.* at ¶¶ 24–25.

⁵¹ *Saskatchewan (Human Rights Commn.) v. St. Paul Lutheran Home of Melville*, [1993] S.J. No. 591, 108 D.L.R. (4th) 671, [1994] 2 W.W.R. 270, 116 Sask.R. 141 [hereinafter *St. Paul*].

⁵² *Id.* at ¶ 1 (construing *Saskatchewan Human Rights Code*, S.S., c. S-24.1, ss. 2(d.1), 16(1), 32).

⁵³ *Id.* at ¶ 11.

⁵⁴ *Id.* at ¶¶ 23–24.

⁵⁵ *Id.* at ¶ 4.

⁵⁶ *Evans*, 2003 N.J. No. 61 at ¶¶ 23–25; *City of Montreal*, 1 S.C.R. 665 at ¶¶ 10–17; *Granovsky*, 1 S.C.R. 703 at ¶¶ 79–81.

⁵⁷ *St. Paul*, [1993] S.J. No. 591 at ¶ 1.

conditions are considered. This may include clarification of the question of guide/assistive dog or other animal use.

B. Guide/Assistive Dogs

Courts seem to be moving toward a more expansive definition of guide/assistive dogs as part of a trend toward a principled approach to the legal definition of disabilities.⁵⁸ This may be the result of courts trying to deal with statutory definitions that do not work, or that are discriminatory, as applied to specific fact situations.

The case of *Lamb v. Lamb* provides some interesting insights into how the issue of disability in relation to animal use was treated by courts before formal legal definitions of disability involving guide/assistive dog use were in place.⁵⁹ This case involved a dispute over property distribution upon the break-up of a marriage.⁶⁰ Mr. Lamb wanted to either retain the matrimonial home, forcing his wife to leave, or allow his wife to stay as a tenant who would pay him rent.⁶¹ Mrs. Lamb was deaf and relied on what courts today would readily define as a guide/assistive dog.⁶² However, at the time, Mrs. Lamb had to struggle to establish the relevance of the dog to her hearing impairment.⁶³ This was a crucial aspect of the case since Mrs. Lamb was arguing that being evicted from her home would be a major problem and it was unlikely that she could find an apartment that would allow her to keep the dog.⁶⁴

The judge linked things that would later emerge in definitions of disability. He allowed that the dog “warns and guides her with regard to doorbells, telephones and such” and “is a very necessary part of her life.”⁶⁵ The court’s order was that Mrs. Lamb would live rent-free in the matrimonial home throughout her life.⁶⁶ This foreshadowed what has become a part of the definition of disability in many pieces of relevant legislation: reliance on a guide/assistive animal.⁶⁷

The right to access public places with a guide/assistive animal has been tested in the courts. In *Parisian v. Hermes Restaurant Ltd.*, a man with a guide/assistive dog was denied access to a restaurant.⁶⁸

⁵⁸ Denise Reaume has advocated for a more expansive approach to interpretation in her discussion of the *Ontario Human Rights Code*. See generally Denise G. Reaume, *Of Pigeonholes and Principles: A Reconsideration of Discrimination Law*, 40 Osgoode Hall L.J. 113 (2002) (arguing for the development of a common law cause of action for discrimination).

⁵⁹ *Lamb v. Lamb*, [1980] O.J. No. 1647.

⁶⁰ *Id.*

⁶¹ *Id.* at ¶¶ 12, 25, 29.

⁶² *Id.* at ¶ 21.

⁶³ *Id.* at ¶¶ 21–22.

⁶⁴ *Id.* at ¶ 22.

⁶⁵ *Lamb*, O.J. No. 1647 at 1705, ¶¶ 21–22.

⁶⁶ *Id.* at ¶ 31.

⁶⁷ *Supra* pt. II(A).

⁶⁸ *Parisian v. Hermes Rest. Ltd.*, [1987] M.J. No. 611, 50 Man. R. (2d) 198, [1988] 3 W.W.R. 118, 47 D.L.R. (4th) 84.

The appeals court found that the Board of Adjudication under the *Manitoba Human Rights Act* erred in finding that it was incumbent upon Mr. Parisian to prove that he was blind.⁶⁹ In another case, *Peters*, the issue was whether refusing to allow a guide/assistive dog to accompany a person visiting a patient in a hospital violated the *Saskatchewan Human Rights Code*.⁷⁰ The trial court held that it was not discrimination to impose a special restriction upon Ms. Peters when she visited a patient at the hospital with her guide/assistive dog.⁷¹ The appeals court, however, held that placing this restriction on Ms. Peters was discrimination.⁷² In so doing, it found that visiting a hospital patient's room constituted using "facilities," unequal access to which constitutes discrimination.⁷³

Several cases have arisen where the right to keep dogs in housing has been challenged. In one 1989 case, *Metropolitan*, the owners of a condominium were told by the developer's agent that they could keep a dog in their unit.⁷⁴ However, the condominium rules prohibited dogs other than guide dogs in the building.⁷⁵ The owners tried to argue discrimination.⁷⁶ The court relied on the *Blind Persons' Rights Act* and the *Human Rights Code* to hold that the allowance of persons with disabilities with guide dogs meant that the condominium rule was not discriminatory.⁷⁷

The positive message from this case is that, even prior to the granting of more comprehensive rights, protection for persons with disabilities is currently in place. Courts are already protecting the right to guide/assistive dog-reliant access. However, the nature of the case may suggest that the law has been used as a way to prohibit other kinds of dogs. This may have negative implications as the range of services that animals provide to persons with disabilities increases.

The argument of this article, that there is an overall trend toward more inclusive definitions of dogs in relation to disability, is bolstered by two cases which suggest that restrictive definitions are under attack. In *Nipissing Condominium Corp. No. 24 v. Ferris*, which took place in 1993, a couple was allowed to keep a dog that, although not meeting the formal requirements of a hearing assistance dog, was considered to be a hearing assistance dog by the courts.⁷⁸ Another case, *Niagara North Condominium Corp. v. Chassie*, took place in 1999

⁶⁹ *Id.* at 21.

⁷⁰ *Peters v. Saskatoon Univ. Hosp.*, [1983] 5 W.W.R. 193, 1 Admin. L.R. 221, 4 C.H.R.R. D/1464, 147 D.L.R. (3d) 385, 23 Sask. R. 123.

⁷¹ *Id.* at 37.

⁷² *Id.* at 43.

⁷³ *Id.*

⁷⁴ *Metro. Toronto Condo. Corp. No. 776 v. Gifford*, [1989] O.J. No. 1691, ¶ 10, 6 R.P.R. (2d) 217 [*Metropolitan*].

⁷⁵ *Id.* at ¶ 5.

⁷⁶ *Id.* at ¶ 11.

⁷⁷ *Blind Persons' Rights Act*, R.S.O., 1980, c. 44 (1980) (Can.); *Human Rights Code*, S.O. 1981, c. 53 (1981) (Can.).

⁷⁸ *Nipissing Condo. Corp. No. 24 v. Ferris*, [1993] O.J. No. 1504, ¶ 10.

before the Ontario Court of Justice (General Division) in St. Catharines, Ontario.⁷⁹ In this case, there was a condominium building with a no pets rule.⁸⁰ The condominium corporation made an application to force a couple, the Chassies, to get rid of a cat they kept in their unit.⁸¹ The court dismissed this application and held that a total prohibition of dogs and cats was not reasonable.⁸² Muriel Chassie had been diagnosed with depression, high blood pressure, and myalgic encephalitis.⁸³ The court considered evidence from doctors which suggested that Ms. Chassie would suffer emotional and physical distress if forced to get rid of the cat.⁸⁴ It went on to hold that she had a handicap within the meaning of the *Human Rights Code*.⁸⁵ It also presented an expansive discussion of the relationship of animals to the question of disability as follows:

Further, the argument that the cat is merely a companion comfort animal providing emotional support, and not a therapy utility animal like a seeing eye dog, does not stand. Her handicap is mental not physical. In the broad sense, as set out above under the heading *The Therapeutic Value of Pets*, there is a growing awareness of the extent which animals improve the mental and physical well being of people. It has been said that therapy dogs have been shown to lower blood pressure, another medical problem of Mrs. Chassie, and help people relax. In the specific circumstances of this case, a part of Mrs. Chassie's treatment for her mental disorder, depression, is the emotional support provided by her cat. I would, therefore, say that the cat is a therapy utility animal and that its ouster would constitute discrimination against Mrs. Chassie because of her handicap.⁸⁶

The holding in this case has several important elements. First, it outlines a court test that established depression as a disability.⁸⁷ Second, it establishes a definition of the relationship between disability and animals.⁸⁸ Third, it holds that the relationship need not be instrumental as it was in the traditional model of guide dogs.⁸⁹ There can be emotional support or "therapy," as well as a desire to avoid the adverse effects caused by the cessation of such emotional support.⁹⁰ This decision has been mentioned and explained in several cases,⁹¹ but has no negative treatment at present.

⁷⁹ *Niagara N. Condo. Corp. No. 46 v. Chassie*, [1999] 173 D.L.R. (4th) 524, 94 O.T.C. 352, 23 R.P.R. (3d) 25.

⁸⁰ *Id.* at ¶ 1.

⁸¹ *Id.*

⁸² *Id.* at ¶ 94.

⁸³ *Id.* at ¶ 22.

⁸⁴ *Id.*

⁸⁵ *Niagara*, 173 D.L.R. at 565–66.

⁸⁶ *Id.* at 566–67.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Becker v City Park Coop. Apts. Inc.*, [2004] CarswellOnt 5370, ¶ 16; *Metro. Toronto Condo. Corp. No. 601 v. Hadbavny*, [2001] CarswellOnt 3777, ¶ 22.

Another more recent case, however, suggests caution in assuming that the issue was settled by the cases of *Metropolitan*, *Nipissing*, and *Niagara*. In *Scarborough Bluffs Co-operative Inc. v. Loomes*, Ms. Loomes lived in cooperative housing that had bylaws prohibiting dogs but allowing cats.⁹² The Scarborough Bluffs Co-operative filed an appeal to the Ontario Superior Court of Justice for a judicial review of an order from the Co-op Board, requiring Ms. Loomes to get rid of her dog.⁹³ She had a letter from her doctor stating that she “would benefit tremendously if she could keep her dog. She suffers from severe depression and anxiety and the dog has great sentimental value.”⁹⁴ The doctor also gave testimony at trial that getting rid of the dog could well send Ms. Loomes into clinical depression.⁹⁵ The court dismissed the application, but gave Ms. Loomes six months to find a new home for the dog.⁹⁶

This more recent case is paradoxical. The facts are very similar to those in *Niagara*, a case dealt with by a higher level Ontario court. The court in *Scarborough* even cites *Niagara* in its decision, but uses a less inclusive definition of disability, and the *Scarborough* court’s holding seems to contradict the higher court.⁹⁷ This suggests that the law is uncertain in this area and may be fact driven. Alternatively, it could be that the lower court made an inappropriate finding by not following the decision of a higher Ontario court and that this was not challenged in an appeal. Therefore, while there seems to be an overall trend toward more inclusive definitions of dogs in relation to disability, this is not wholly consistent.

Further evidence of the courts’ willingness to expand the definition of animals is provided in *R. v. Olendy*, a criminal prosecution for cruelty to a guide/assistive dog.⁹⁸ Mr. Olendy was convicted of causing unnecessary suffering to his guide/assistive dog.⁹⁹ Two things in this case are germane to the discussion of legal definitions of animals. First, the court likened the abuse to that of a family member.¹⁰⁰ Second, the court referred to guide/assistive dogs as “special,” and worthy and valuable as “life companions.”¹⁰¹ This suggests a significant expansion of the definition of guide/assistive dogs through this definition of disability.

Questions of the legal application of the term disability become more interesting still in the 2002 case of *Soto v. Canada*.¹⁰² This case

⁹² *Scarborough Bluffs Coop. Inc. v. Loomes*, [2003] O.J. No. 325, 10–11, ¶¶ 1–2; 7 R.P.R. (4th) 80.

⁹³ *Id.*

⁹⁴ *Id.* at ¶ 2(g).

⁹⁵ *Id.* at ¶ 27.

⁹⁶ *Id.* at ¶¶ 31, 33.

⁹⁷ *Id.* at ¶¶ 12–14.

⁹⁸ *R. v. Olendy*, [2001] O.J. No. 1957 (QL) (unpublished opinion).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at ¶ 6.

¹⁰¹ *Id.* at ¶¶ 10, 12.

¹⁰² *Soto v. Canada* (Minister of Citizenship & Immig.), [2002] F.C.T. 768.

involved Ms. Soto's request for a finding by the Convention Refugee Determination Division of Immigration and Refugee Canada that she qualified as a refugee.¹⁰³ She was visually impaired and had been fired from a job in Chile when she started using a guide/assistive dog.¹⁰⁴ The original determination was that this did not constitute the well-founded fear of persecution that was necessary to qualify for refugee status and that she could earn a living if she remained in Chile.¹⁰⁵ She applied to the Federal Court of Canada, Trial Division for a review. This court found that the evidence did not support the original finding that Ms. Soto could earn a living in Chile.¹⁰⁶ The case was referred back for a rehearing with a new panel,¹⁰⁷ but there is no subsequent information available. However, the case does indicate an expanding definition of dog use as an aspect of disability by entering into questions of immigration.

In total, this case law suggests a move toward a more expansive notion of disability regarding guide/assistive dogs or animals with one cautionary note. It is possible to argue that this notion will expand further in the near future because more cases will arise for several reasons. Population aging in Canada means that the proportion of persons living with disabilities will increase.¹⁰⁸ A growing range of assistive services provided by animals will mean that a greater proportion of the population will rely on assistive animals.¹⁰⁹ As the "baby boomers" move into retirement and later life, they will transition from private houses to condominiums or assisted health care settings with rules pertaining to animals.¹¹⁰ This will continue a trend toward increasingly inclusive definitions as the "baby boomers" use their political influence and money to fight for the rights of their elderly parents now and their own rights in the near future.¹¹¹

The review of case law, therefore, lends further support to the argument that what affects dogs affects disability rights to some extent. Definitions of disability that involve social construction models of animal assistance are being applied by courts, including the Supreme Court of Canada. Dogs and other animals are increasingly being seen in terms of this model, and courts have shown a willingness to expand the model relating persons with disabilities and their assistive animals to include emotional as well as physical dimensions. Legislation

¹⁰³ *Id.* at ¶ 1.

¹⁰⁴ *Id.* at ¶ 3.

¹⁰⁵ *Id.* at ¶¶ 7, 2.

¹⁰⁶ *Id.* at ¶¶ 7-8, 18-21.

¹⁰⁷ *Id.* at ¶ 22.

¹⁰⁸ The Atlas of Canada, *An Aging Population*, <http://atlas.gc.ca/site/english/maps/health/ruralhealth/agingpop/1> (last updated Feb. 16, 2004).

¹⁰⁹ Rebecca J. Huss, *No Pets Allowed: Housing Issues and Companion Animals*, 11 *Animal L.* 69, 70-71 (2005) (dissussing the large portion of people who report health and support benefits from companion animals).

¹¹⁰ *Id.* at 90-93, 103.

¹¹¹ *See generally id.* at 69 (showing the trend towards more inclusive definition of support animal).

that affects dogs also, therefore, affects disability rights. To this end, one law that restricts dogs and the ownership of dogs, the OPBL, is examined below.

IV. PROBLEMATIC DOG-FOCUSED LAW: THE ONTARIO PIT BULL LEGISLATION (OPBL)

Integration of dogs and disability as a legal construct is seen in statutes, justified by theories of social construction, and enforced by courts. This should not be construed as an argument that this is an exclusive or exhaustive connection. Rather, it is an argument that there is a connection that has entered into the realms of housing, work, health care, immigration, tax law, and criminal prosecution.¹¹² The areas where this connection appears are likely to increase.¹¹³ This provides a rationale for taking a critical look at dog-focused legislation that may have a negative impact on dogs in general and, through this, on disability issues.

In this vein, the OPBL will likely be problematic for dogs and their owners. This is particularly relevant because the statute defines ownership broadly as the possession or harboring of any type of dog.¹¹⁴ This could encompass situations ranging from long-term ownership with any kind of dog living in your home to temporary relationships like walking, grooming, or veterinary services. Therefore, the number of persons potentially affected is large and would seem to capture even fleeting relationships between humans and guide/assistive dogs.

Royal Assent was given to the OPBL on March 9, 2005.¹¹⁵ This was done via The Dog Owners Liability Act Amendment Act that amends the Dog Owners' Liability Act.¹¹⁶ There were two bills, 161 and 132, that ultimately fed into the final version of the act.¹¹⁷ This legislation arose in a storm of controversy and competing views.¹¹⁸ It came into effect as of August 29, 2005.¹¹⁹

¹¹² *Supra* pt. III.

¹¹³ See *supra* nn. 109–112 and accompanying text (discussing the aging population and corresponding growth of numbers of persons using guide/assistive animals). This suggests a further expansion into other areas.

¹¹⁴ R.S.O., ch. D.16, §1 (1990); 2005, ch. 2, §1 (2).

¹¹⁵ *Public Safety Related to Dogs Statute Law Amendment Act*, S.O. c.2 (2005); *Dog Owners' Liability Act*, R.S.O., c. D.16 (1990) (available at http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90d16_e.htm#BK6).

¹¹⁶ *Id.*

¹¹⁷ Bill 132, *An Act to Amend the Dog Owners' Liability Act to Increase Public Safety in Relation to Dogs, Including Pit Bulls, and to Make Related Amendments to the Animals for Research Act*, 1st Sess., 38th Parliament, Ontario, 2004; Bill 161, *An Act to Amend the Dog Owners' Liability Act*, 1st Sess., 38th Parliament, Ontario, 2004.

¹¹⁸ See Alan Barber, *Dog Legislation Council of Canada, Peterborough Ontario Solicitor Report, Banning Certain Breeds of Dogs*, <http://www.doglegislationcouncilcanada.org/peterboroughlegal.html> (last updated Jan. 21, 2006) (discussing public debate about the proposed law); Marjory Darby, *An Open Letter to Michael Bryant*, <http://www.goodpooch.com/BSL/openlettertomichaelbryant.htm> (updated Oct. 2005).

¹¹⁹ R.S.O., c. D.16.

Several features of this legislation are worth exploring in conjunction with other relevant municipal legislation. The City of Winnipeg's Pound By-laws are particularly relevant since these laws were held out as a model during the debates that led to the enactment of OPBL.¹²⁰ They are also at issue in the only available Canadian case law on challenges to this type of legislation.¹²¹ Below, several features of the Ontario legislation are examined: definitions, proof, impetus for proceedings, guide/assistive dogs, penalties, and process. Throughout this consideration, it is argued that the OPBL is flawed by vagueness and legal contradictions. This is problematic for dogs, dog owners, and people who rely on assistive services from dogs.

A. *Definition of Pit Bull*

In the OPBL, the definition of pit bull includes "(a) a pit bull terrier, (b) a Staffordshire bull terrier, (c) an American Staffordshire terrier, (d) an American pit bull terrier, (e) a dog that has an appearance and physical characteristics that are substantially similar to those of dogs referred to in any of clauses (a) to (d); ('pit bull')." ¹²² In determining whether or not a dog is a pit bull, the court *may* regard breed standards established by various official kennels clubs.¹²³

The OPBL's definition can be critiqued for vagueness on several grounds. There are specific breeds listed. However, by offering that kennel club standards may be considered to decide on breed, the definition has no specificity. This is seen in use of the word "may" that gives no firm direction as to what will or will not be the standard. This means that it will likely be left to the courts to decide what evidence can be admitted.

B. *Impetus for Proceedings*

Under the OPBL, an action against a dog or owner is commenced on several grounds. Owning, breeding, transferring, abandoning (other than to a pound), importing, allowing to stray, or training a pit bull to fight is prohibited.¹²⁴ For all dogs, a proceeding may be commenced against the owner if "the dog has bitten or attacked a person or domestic animal," or "behaved in a manner that poses a menace to the safety of persons or domestic animals."¹²⁵ Proceedings may also be commenced if an owner fails to take reasonable precautions to prevent their dog from biting, attacking, or menacing.¹²⁶ It is important to note that the provisions in section 4.1 above apply to all dogs, not just pit

¹²⁰ See *Dog Ban More Bark than Bite*, Toronto Sun 18 (Jan. 24, 2005) (noting support for Winnipeg's model pit bull ban).

¹²¹ *Manitoba Assn. of Dog Owners Inc. v. Winnipeg (City)*, [1993] M.J. No. 661.

¹²² R.S.O., c. D.16 at § 1.2.

¹²³ *Id.*

¹²⁴ *Id.* at § 6.

¹²⁵ *Id.* at §§ 4.1(a)–(b).

¹²⁶ *Id.* at § 4.1(c)(1)–(2).

bulls. This becomes problematic because what has come to be known as pit bull legislation has effectively increased the potential criminalization of ownership of any dog regardless of breed.

In this context, the issues of biting, attacking, and/or menacing as the impetus for proceedings are problematic for two reasons. First, there is no direct allowance for whether or not a bite or attack is provoked.¹²⁷ This means that proceedings can be started against dogs who are acting in self-defense or in protection of their owners. Second, there is no direct mention of severity, although courts may indirectly consider severity and provocation as factors when making an order for the destruction or restraint of a dog.¹²⁸ One can argue that the lack of direct mention may become problematic because such considerations will come relatively late in the process, perhaps after a dog has already been killed by a peace officer or pound operator.

By merely relegating severity and provocation to an indirect and discretionary aspect of proceedings, the Ontario legislation stands in contrast to other examples of dog-focused legislation. For example, the City of Toronto Municipal Code defines “bite” as “[p]iercing or puncturing the skin as a result of contact with a dog’s tooth or teeth.”¹²⁹ The Winnipeg By-law recognizes both severity and provocation by defining dangerous dogs as ones who have—without provocation—caused severe injury to a person or killed a domestic animal.¹³⁰ In this legislation, “severe injury” is defined as a “physical injury that results in broken bones or disfiguring lacerations requiring multiple sutures or cosmetic surgery.”¹³¹

In contrast, “attack” and “menace” are undefined terms in the Ontario legislation. Dogs frequently charge at threats, human or animal, to warn.¹³² Young or untrained dogs often jump up on people to lick them.¹³³ Dogs bark, growl, and snap at threats.¹³⁴ Dogs defend and refuse to leave vulnerable owners or animals, particularly if the person or animal is sick or injured.¹³⁵ Are these attacks? Are the attacks menacing? Yes, in some ways. Indeed having a dog may be recommended

¹²⁷ *Id.* at § 1 *et seq.*

¹²⁸ R.S.O., c. D.16 at § 4.6.

¹²⁹ *City of Toronto Mun. Code*, c. 349-1.

¹³⁰ *The City of Winnipeg, The Pound By-law*, No. 2443/79 § 20.1.4.a.1 (available at <http://winnipeg.ca/clerks/pdfs/bylaws/2443.79.pdf>).

¹³¹ *Id.* at § 16.

¹³² See Rich Harden, *Aggressive Pet Could Be Scared or Angry*, *Richmond Times-Dispatch* 10 (May 10, 1989) (explaining that a dog’s aggressive behavior can be an attempt “to protect against perceived threats to the family or property”).

¹³³ See *The Last Word*, 179 *New Scientist* 81 (Aug. 2, 2003) (“By trying to lick human faces a dog is expressing its recognition of our superior social status and inviting us to be friendly.”).

¹³⁴ See *Four-Legged Friends with Attitude*, *Torquay Herald Express* 28 (July 31, 2004) (describing behavior of dogs used for personal protection and trained security dogs).

¹³⁵ See *Nestle Purina PetCare Hands Out Annual Awards for Pet Heroism; Purina Animal Hall of Fame Honours Three Gutsy Canines and One Plucky Cat for Life-Saving Efforts*, *Canada NewsWire* (May 5, 2003) (noting altruistic acts of approximately one

as an effective safety measure in preventing crimes against property or person. But to label protective behavior as contravening a law that has severe penalties deprives owners of their right to ensure their safety in a way that is a deterrent. This may be particularly problematic for guide/assistive dogs, who may act in the interest of the safety of a person with a disability.

Therefore, one can argue that the definition of behavior by a dog that is the impetus for proceedings is overly inclusive. Because of this, the OPBL may function as a *carte blanche* for penalizing dogs and their owners in a context where the legal definition of owner is broad. This is certain to lead to problems and may be particularly relevant in criminal cases where a person's right to self defense through an animal comes into conflict with the Ontario legislation.¹³⁶

Imagine a case where a marginally employed person with a disability needs to work nights at an all night convenience store to support her family. She brings her dog with her for protection at work, and during the trip to and from work. On the way home in the middle of the night, the woman is approached by a person suggesting menace, and her dog barks or bites to protect her. I suspect that a court will be unlikely to find liability on the part of the owner or order the dog killed in these circumstances. Yet the Ontario legislation would seem to legitimize commencing proceedings and punishment in this fact scenario. Ultimately a court could take the circumstances into consideration under the discretion granted in section 4.6 of the OPBL.¹³⁷ However, until case law develops on this issue, there is a window of vulnerability for dog owners in general, and for persons with disabilities in particular. Because of this, persons who rely on guide/assistive dogs may be deprived of necessary support.

This vagueness in impetus for proceedings adds to the vagueness in the definition of pit bulls that may lead to Charter challenges. The Supreme Court of Canada has held that laws must be specific in order to not offend section 7 of the Charter.¹³⁸ Vagueness in laws offends the principles of fundamental justice set out in section 7 of the Charter.¹³⁹ However, it is unlikely that any challenges will take place on this level before the harm is done, and a dog has been killed or removed from the owner. Even if legal challenges do take place, the owner will have to pay for them.¹⁴⁰ Killed dogs cannot be restored on appeal.

hundred dogs inducted in the Hall of Fame since 1968 for feats, including bringing help to their sick and injured owners).

¹³⁶ See R.S.O., c. D.16 at § 6 (discussing an owner's obligation to prevent a dog from attacking).

¹³⁷ R.S.O., c. D.16 at § 4.6.

¹³⁸ *R. v. Nova Scotia Pharm. Socy.*, [1992] 2 R.C.S. 606 (CA.1.).

¹³⁹ *Canadian Charter of Rights and Freedoms*, Schedule B to the *Canada Act 1982* (U.K.), c. 11, § 7 (1982) (available at <http://laws.justice.gc.ca/en/charter/index.html>).

¹⁴⁰ However, if the owner wins the suit, he may recover legal fees and expenses from the plaintiff, according to Canada's general "loser-pays" rule. Steven R. Schoenfeld et al., *Fundamentals for Law Firms and Their Clients in the Cross-Border Market*, 21 No. 12 Of Counsel 8, 9 (2002).

This may be particularly problematic for persons with disabilities, who tend to have lower financial status,¹⁴¹ as highlighted by recent figures on how disability welfare payments mean that people are living below the poverty line.¹⁴² Problems may be exacerbated for women with disabilities.¹⁴³ Relatively lower financial status means that person with disabilities will be less able to afford undertaking legal action to enforce their rights.¹⁴⁴

C. Proof: Presumed Pit Bull

Vagueness in the definition of pit bull and impetus for proceedings becomes more troubling when we look at the onus of proof for establishing that a dog is, or is not, a pit bull. In the Ontario legislation, the owner of a dog has the onus of proving that a dog is *not* a pit bull.¹⁴⁵ This implies a presumption that the owner is guilty, in that the process begins with the assumption that all dogs are pit bulls. Providing evidence that a dog is not a pit bull is, therefore, the equivalent of rebutting a presumption.

The problem of the onus of proof is further complicated by the standard of proof. This is set as the balance of probabilities.¹⁴⁶ A signed certificate from a veterinarian stating that a dog is a pit bull will be accepted as evidence if there is no evidence to the contrary.¹⁴⁷ However, problems are certain to arise when veterinarians attempt to apply the vague definition of pit bull provided in the legislation. This will be exacerbated when kennel clubs offer conflicting definitions. Given that there is confusion and conflict in the category, there is a high likelihood that two veterinarians will come to different conclusions as to which dogs fit the category. This becomes even more complex in section 19(3), which states that the onus on the prosecution to prove beyond a reasonable doubt is not removed.¹⁴⁸ In total, this is at least murky and perhaps contradictory on the issue of onus of proof.

¹⁴¹ K. Seelman & S. Sweeney, *The Changing Universe of Disability*, 21 *Amer. Rehabilitation* 2 (1995) (In 1998, the general population in the United States had an average annual household income of \$34,017, while that of people with disabilities was about \$18,000—a 47% difference.).

¹⁴² Natl. Council of Welfare, *Welfare Incomes 2003*, 121 *Natl. Council Welfare Rpts.* 1, 28 (Spring 2004) (available at http://www.newcnbes.net/htmldocument/reportWelfareIncomes2003/WI2003_e.pdf).

¹⁴³ Catherine Frazee et al., *Now You See Her, Now You Don't: How Law Shapes Disabled Women's Experiences of Exposure, Surveillance, and Assessment in the Clinical Encounter*, in *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law* 10 (Dianne Pothier & Richard Devlin, U. British Columbia Press, forthcoming).

¹⁴⁴ See e.g. Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2001 *Utah L. Rev.* 247, 318 (2001) (noting that a person with a disability may decide against addressing discrimination with a lawsuit because of cost).

¹⁴⁵ R.S.O. 1990, c. D.16 at § 4(10).

¹⁴⁶ *Id.* at § 4(1.3).

¹⁴⁷ *Id.* at § 19(1).

¹⁴⁸ *Id.* at § 19(3).

This leads to an uncomfortable combination of a vague definition of pit bull, vague impetus for proceedings, a pit bull presumption, and mixed standards of proof. It suggests a process that is at least confusing and may stack the process against owners. Using the civil standard of proof, a balance of probabilities would seem to evoke the civil principle that the burden of proof lies on the plaintiff.¹⁴⁹ The OPBL legislation attempts to shift this burden to the defendant.¹⁵⁰ At the same time the prosecution retains the onus of proof beyond a reasonable doubt.¹⁵¹ Given this, it remains to be seen how courts will deal with the Ontario legislation when assessing evidence and liability. This lack of clarity may add to the indices of vagueness outlined above and could lead to Charter challenges regarding principles of fundamental justice.

Another pit bull statute that has been challenged in the courts, the Winnipeg By-law, might be instructive here.¹⁵² This legislation is similar to the OPBL legislation in that it also involves pit bulls.¹⁵³ It was challenged in 1993 before the Manitoba Court of Queen's Bench in *Manitoba Assn. of Dog Owners Inc. v. Winnipeg*.¹⁵⁴ In this case, questions of vagueness and discrimination were raised.¹⁵⁵ The court held that the by-law was clear and precise.¹⁵⁶ It rejected the argument that provisions for banning dogs that resemble defined breeds were vague and imprecise, because the legislation required a licensed veterinarian to make the determination.¹⁵⁷ The court also rejected the argument that the law was discriminatory by citing other instances where a court upheld differing fees for dogs in different categories.¹⁵⁸

This case could provide a road map for how the OPBL will be received by the courts. However, there are key differences between the Winnipeg legislation and the Ontario legislation. The Winnipeg and Ontario laws list the same breeds,¹⁵⁹ and both statutes have a clause addressing similarity to the defined breeds.¹⁶⁰ However, Winnipeg By-law section 16(v) uses the following standard for determining whether the particular breed falls within the breeds contemplated by the law: “[a]ny dog which has the appearance and physical characteristics predominantly conforming to the standards for any of the above breeds.”¹⁶¹ OPBL uses the standard, “an appearance and physical

¹⁴⁹ See e.g. *Bradley Air Servs. Ltd. v. Chiasson*, [1995] CarswellNat 1021 ¶ 4 (noting that the civil burden of proof is “proof on the balance of probabilities”).

¹⁵⁰ R.S.O. 1990, c. D.16 at § 4(10).

¹⁵¹ *Id.* at § 19(3).

¹⁵² *The City of Winnipeg, The Pound By-law*, *supra* n. 130.

¹⁵³ *Id.* at § 6.

¹⁵⁴ *Manitoba Assn. of Dog Owners Inc.*, M.J. No. 661 at § 20.2.

¹⁵⁵ *Id.* at ¶¶ 11–14, 25–28.

¹⁵⁶ *Id.* at ¶ 12.

¹⁵⁷ *Id.* at ¶¶ 11–14.

¹⁵⁸ *Id.* at ¶¶ 15–24.

¹⁵⁹ *The City of Winnipeg, The Pound By-law*, *supra* n. 130, at § 16(g); R.S.O., c. D.16 at § 1.

¹⁶⁰ *Id.* at § 16(g)(v); R.S.O., c. D.16 at § 1(e).

¹⁶¹ *Id.*

characteristics that are substantially similar.”¹⁶² The Winnipeg By-law has a higher and more precise standard in its use of “predominantly conforming.” Also, the Winnipeg By-law section 16(v) determination is made by a licensed veterinarian,¹⁶³ whereas the Ontario determination puts a reverse onus on the owner to prove a dog is not a pit bull,¹⁶⁴ with veterinarian certificates accepted in the absence of other evidence.¹⁶⁵

Thus, it might be possible to read the decision in *Manitoba* in reverse. The court decision to uphold the legislation can be tied to specific parts of the Winnipeg legislation that demarcate a more reasonable process in determining whether a dog is a pit bull.¹⁶⁶ This can be contrasted with aspects of the Ontario legislation that are less reasonable and therefore stray onto tenuous legal ground. Or, Ontario courts may not feel bound by the decision of a Manitoba court. This will be interesting to follow as legal challenges of the OPBL are put forward in Ontario.

D. Guide/Assistive Dogs

As mentioned above, in the OPBL, an “owner” is defined as anyone who “possesses or harbours” a dog.¹⁶⁷ This suggests that a person who relies on a guide/assistive dog will be defined as an owner for the purposes of the statute. There is no mention of guide/assistive dogs or persons with disabilities in the OPBL. In contrast, the Winnipeg By-law sections 20.1(c) and 20.2 deal with disability and guide/assistive dog issues by allowing any dog owner who is blind, deaf, or hearing impaired, owns a registered guide dog, or is being assisted by a guide dog to let the dog defecate on property other than their own, and by exempting these owners from picking up the dog excrement.¹⁶⁸ Further, unlike people who do not fit the classification, people in this category are allowed to bring their dogs onto school grounds and playgrounds.¹⁶⁹

This makes it possible to argue that failure to explicitly address guide/assistive dogs in the OPBL is problematic. The Winnipeg By-law has similar provisions regarding the definition of pit bulls.¹⁷⁰ However, the totality of the Winnipeg By-law makes it clear that guide/assistive dogs are included in a special category.¹⁷¹ The OPBL does

¹⁶² R.S.O., c. D.16 at § 1(1)(e).

¹⁶³ *The City of Winnipeg, The Pound By-law*, *supra* n. 130.

¹⁶⁴ R.S.O., c. D.16 at § 4(10).

¹⁶⁵ *Id.* at § 19(1).

¹⁶⁶ *Manitoba Assn. of Dog Owners Inc.*, 1993 M.J. No. 661 at §§ 15–22.

¹⁶⁷ R.S.O., c. D.16 at § 1(1).

¹⁶⁸ *The City of Winnipeg, The Pound By-law*, *supra* n. 130, at §§ 20.1(h), 20.2.

¹⁶⁹ *Id.* at § 20(2).

¹⁷⁰ *Id.* at § 16; R.S.O., ch. D.16 at § 1.

¹⁷¹ *The City of Winnipeg, The Pound By-law*, *supra* n. 130, at §§ 16, 18(b), 20(e), 20.2. (These sections distinguish guide dogs by defining them as a separate category and by establishing exceptions to the standard rule for them.)

not. Because of this, cases will likely arise where the access rights of persons with disabilities clash with the rights of persons who claim menace or attack by a dog.

E. Penalties and Process

In the OPBL, upon conviction, persons may be fined up to \$10,000, imprisoned for up to six months or both and/or be ordered to make compensation or restitution.¹⁷² Corporations may be fined up to \$60,000.¹⁷³ Seized dogs must be promptly delivered to a pound.¹⁷⁴ Peace officers may use “as much force as necessary” in executing warrants.¹⁷⁵ This suggests that a dog can be killed by a peace officer during seizure. Conceivably, lethal force can be used against an owner who tries to physically prevent the removal of the dog. This has significant implications for persons with disabilities who rely on guide/assistive dogs. As mentioned above, there is no specific qualification or exemption for guide/assistive dogs in the Ontario legislation. This means that a person with a disability relying on a guide/assistive dog could have their dog seized or killed by a peace officer. Either outcome would impair the ability to function of the person with a disability. The person will, therefore, either be forced to fight for the return of her dog in a state of decreased accommodation, or be temporarily deprived of necessary guide/assistive dog support until the dog is returned, or until it is replaced (if the dog is killed). Either scenario suggests that the Ontario legislation is destined to lead to cases that challenge its lack of attention to persons with disabilities.

Because of this, problems with the lack of specified process may come back to haunt the OPBL as court challenges arise. Instructive in this vein is the 1971 case of *Regina v. Soper*, where an owner appealed an order for the destruction of his dog to the Ontario District Court.¹⁷⁶ The destruction had been ordered under the *Vicious Dogs Act* that contained no right of appeal.¹⁷⁷ The question put to the court was whether the owner could appeal the destruction order.¹⁷⁸ The court held that there was a right of appeal, based on general principles of fair process.¹⁷⁹ It emphasized that a lack of appeal would only be allowable where the penalty involves only a monetary fine.¹⁸⁰ A right of appeal is only implied in the Ontario legislation: section 4.2 of the OPBL speaks

¹⁷² R.S.O., ch. D.16 at §§ 18.1, 18.1.3.

¹⁷³ *Id.* at § 18.3.

¹⁷⁴ *Id.* at § 17.

¹⁷⁵ *Id.* at § 16.

¹⁷⁶ *Regina v. Soper*, [1970] CarswellOnt 724.

¹⁷⁷ *Id.*; *Vicious Dogs Act*, R.S.O., c. 418 (1960).

¹⁷⁸ *Regina*, CarswellOnt 724 at ¶ 4.

¹⁷⁹ *Id.* at ¶¶ 5–10.

¹⁸⁰ *Id.* at ¶ 7.

to the ability to make an interim order pending the appeal of an order.¹⁸¹ There is no direct mention of the right of appeal.¹⁸²

All of the elements in the OPBL, discussed in detail above, may be problematic for dogs and dog owners. These are broad categories, since the legislation is so broad that it covers all dogs and all persons who harbor a dog.¹⁸³ Definitions of categories, procedures, and rights are vague and broad.¹⁸⁴ This means that legal battles are certain to ensue as courts are asked to give specificity to various aspects of the legislation. While it is difficult to speculate on the form this specification may take, it seems relatively certain that there will be significant legal expenses for dog owners and dogs may be removed from their homes or killed while the details are being worked out.

V. CONCLUSION: DISABILITY AND CRIMINALIZATION OF DOG USE

Dog use is a relevant feature of the definition of disability. The link between dogs and disability is seen in statutes, connected to social theory, and reflected in relevant case law. Because of this, any legislation that holds the potential to have a negative impact on dog use is problematic for the rights of persons with disabilities. Various features of the OPBL could have such a negative impact. This is one example of the general principle that dogs and disability rights are a linked legal construct in some aspects.

It is worthwhile to consider disability rights in debates and cases involving dogs and dog-focused legislation. This deliberation may have long lasting benefits in terms of preserving hard fought rights for persons with disabilities. It could also inform legislation involving dogs in general. The model of guide/assistive dog use could show how responsible dog ownership benefits humans in multiple ways. It may also add a dimension to political actions that are aimed at fostering positive relationships between dogs and humans.

¹⁸¹ R.S.O., c. D.16 at § 4(10).

¹⁸² *Id.*

¹⁸³ *Supra* nn. 145–148 and accompanying text.

¹⁸⁴ *Supra* nn. 124–136 and accompanying text.

